Supreme Court, U.S.
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NO. 92-307

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1992

John D. Elliott and C. Leonard Davis,

Petitioners,

v.

The City of Athens, Georgia, and the Mayor and Council of the City of Athens, Georgia; Dwain P. Chambers; Miriam Moore; Harry Sims; Cardee Kilpatrick; Kathy Hoard; Linny Bailey; Mac Coile; Carolyn Reynolds; Gwen O'Looney; and Calvin Bridges,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

Frank E. Jenkins, III (Counsel of Record)
Kirk R. Fjelstul
Counsel for Respondents
JENKINS & EELLS
3005 Chamblee-Tucker Road
Suite 500, The Rhodes Building
Atlanta, Georgia 30341
(404) 457-1850

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Legislative History:

House Report No. 100-71, June 17, 1988, Congressional Record, Vol. 134, (1988)

STATEMENT OF THE CASE

This is a Fair Housing Act case involving handicapped persons. The Act is codified at 42 U.S.C. § 3601 et. seq. The case centers solely on the zoning ordinance provision of the City of Athens, Georgia which limits the number of unrelated persons who may reside in any single-family dwelling, regardless of handicap. The limitation in the ordinance is a neutral restriction on the density of a use and impacts every citizen of the City of Athens, Georgia equally.

Contrary to the Petitioners' assertions in the second paragraph of their Statement of the Case, the issue is not whether the Fair Housing Act will be frustrated. Instead the case before the Court is an effort by the Petitioners to stretch the Act beyond its limits. The Petitioners would like to have a use consisting of fourteen persons on a lot in a single-family residential zoning district in

the city. At issue is whether the Petitioners are entitled to a home consisting of fourteen recovering alcoholics and drug addicts (including two live-in counselors) simply because that is the number that the Petitioners want. Rather than allow fourteen persons to occupy a lot where the average density is less than four, the city is entitled to exercise a reasonable occupancy limitation as authorized by 42 U.S.C. § 3607(b)(1).

Unlike most of the Fair Housing Act cases, the Petitioners are not handicapped, they are real estate investors. Unlike most Fair Housing Act cases, this does not involve a local ordinance or regulation which is specifically directed towards handicapped persons. For example, this case does not involve special use permits and it does not involve dispersion or distance requirements between group homes. A halfway house of the

type suggested by the Petitioners is free to operate on the property which is the subject of this litigation so long as the limits on occupancy are respected.

The Petitioners are the owners of two detached single-family homes located on a single lot at 490-490½ Ruth Street in the City of Athens, Georgia. The Petitioners are not handicapped, but purchased the Ruth Street property in a foreclosure sale on the courthouse steps for the purpose of financial investment. They did not have a particular buyer in mind, and since Elliott is in the real estate business, the property was listed with the company for which he is an agent. The Reverend Jack Lindsay, director of The Potter's House, expressed an interest in purchasing the subject property from the Petitioners for use as a halfway house for recovering alcoholics and drug addicts.

The Potter's House and the Petitioners

entered into a contract whereby The Potter's House agreed to purchase the Ruth Street property, contingent upon the Petitioners obtaining the proper zoning. The Ruth Street property is located in a low density single-family residential zoning district (RS-10). The Zoning Ordinance for the City of Athens, Georgia provides that the only permitted residential use on a lot in an RS-10 district is one single-family detached dwelling. The maximum number of people who are permitted under the zoning ordinance to live in a single-family dwelling is limited by the definition of the term "family" as found in the zoning ordinance. That definition of family provides, as follows:

> One (1) or more persons occupying a single dwelling unit, provided that unless all members are related by blood, marriage or adoption, no such family shall contain over four (4) persons. Domestic servants employed on the premises may be housed on the premises without being counted as a separate family or families. In addition, a

> related family may have up to two (2) unrelated individuals living with them. The term "family" does not include any organization or institutional group.

The Assistant Planning Director for the City of Athens, Georgia, Kenneth Suddreth, testified that in accordance with the definition, persons are permitted to reside in a single-family dwelling regardless of the use, so long as no more than four unrelated persons reside in a dwelling.

The RS-10 district permits one single-family structure per lot, but because two structures were located on the Ruth Street property prior to the adoption of the ordinance, a grandfather clause allows the two single-family dwellings to remain. As a result, four per dwelling or up to eight unrelated persons are permitted to reside on the Ruth Street property. The Reverend Lindsay is free to use the property as a halfway house, as long as the limits of no

more than four unrelated persons per household are respected.

This case is before the Court only because the Reverend Lindsay wanted fourteen residents, twelve of which were to reside in one of the homes. The planning department advised the Petitioners that the proposed use was not permitted on the Ruth Street property because of the excessive number of persons. The planning department further advised the Petitioners that the only permitted use was a "boarding house" because up to twenty persons were permitted to reside in such a dwelling. A boarding house is not permitted in an RS-10 zoning district and, as a result, the Petitioners applied to have the Ruth Street property rezoned to an RM-2 multi-family district where such a use is permitted.

The planning department staff recommended denial of the rezoning application for reasons that the Ruth Street property is located in a

single-family district and rezoning the property to multi-family would set a negative precedent for the neighborhood's future and it would constitute spot zoning. There would be a distinct change in the character of the use in allowing fourteen rather than four. The planning commission voted to recommend denial of the application and the city council voted unanimously to deny the application. The vote was ten to zero. All of the property along Ruth Street is zoned RS-10 and photographs taken by the planning department demonstrate that Ruth Street is distinctly residential.

At the trial of the case, the Respondents presented evidence of the basis of the zoning ordinance. The zoning ordinance is designed to minimize the negative impacts and conflicts associated with the differing uses in a community. For example, business and industrial uses are separated from residential uses. Low density residential uses such as

houses are separated from high density residential uses such as apartments.

Beyond these reasons the presence of a major university, the University of Georgia, has a major impact on the City of Athens, Georgia, and presents unique problems in terms of planning and zoning. Mr. Suddreth testified that the number of students attending the university greatly exceeds the available on-campus housing. The demand for housing the remainder of the students creates an excessive rental market. This, along with the limited financial means of students creates a desire to fit large numbers of people into the available units in order to share costs. Additionally, college students create their own unique noise and safety problems that are magnified by the large number of students.

The unique effect of college students on the residential character of a neighborhood

when occupancy limits are not respected in a university town was demonstrated by Mr. Leon Eplan. Mr. Eplan is a land use planner and is currently the Commissioner of Planning and Economic Development for the City of Atlanta, Georgia. He cited the Homewood neighborhood around Georgia Tech University as an example. Homewood began as a very prominent single-family neighborhood. As the university grew and the demand for student housing increased, it became profitable to rent homes in the neighborhood to students by increasing the density of use. Unfortunately, at the time this occurred, Atlanta had no zoning ordinance and student rentals occurred unchecked. Student rentals destroyed the single-family character of the neighborhood and made it unattractive for family living. By the time zoning was introduced to Atlanta, single-family zoning was no longer appropriate.

Both Mr. Eplan and Mr. Suddreth testified

that limiting the number of persons that may reside in a dwelling by limiting the number of unrelated persons is the method used by the vast majority of counties and municipalities. Similarly, the number four is the most common limitation. Athens chose the number four by rounding up the 1960 census figure for average household size. Since 1960 average household size has fallen to less than three, but the city has chosen not to reduce its limit.

Further, Mr. Eplan testified that in protecting a single-family neighborhood, limiting the number of unrelated persons is important because the larger percentage of unrelated persons residing together are adults. This is significant because adults have a greater negative impact on the environment. When the number of unrelated persons gets above four or five, the impact begins to destroy the single-family character. Permitting fourteen persons would cause a very

abrupt change that would not be consistent with the residential character of the neighborhood.

The Petitioners suggested alternatives for limiting the number of persons permitted to reside in a single-family dwelling, but Mr. Eplan testified that these are unworkable. The Petitioners suggest limiting the number of persons on a square footage basis or a limit per dwelling without regard to relationship of the individuals. Mr. Eplan testified that although a very few jurisdictions have adopted such methods, they are unworkable. Among other things, a family would be forced to move when a child was born that caused the limit to be exceeded. If the limit were set too high, in an effort to avoid this possibility, the ability to preserve residential character would be defeated. This would be especially harmful in a college town. Permitting fourteen persons, as the Petitioners suggest,

would clearly defeat the ability of the city to protect single-family neighborhoods. The same would be true if a group home use in the ordinance permitted fourteen residents in a single-family district.

The Petitioners did not prove that the halfway house could not operate in the single-family district and respect the occupancy limitations. The Reverend Lindsay presented testimony on behalf of the Petitioners with respect to The Potter's House. He testified that The Potter's House was to have a total of fourteen residents, twelve recovering alcoholics and drug addicts and two counselors. The Reverend Lindsay testified that he never considered any number other than fourteen. The Reverend Lindsay next testified that he would charge each of the residents $75.00 per week for all of their needs including food, shelter, and clothing. When asked how he arrived at this figure, the

Reverend Lindsay initially testified that this was the minimum required to meet the costs to make the home self-sufficient. However, later the Reverend Lindsay admitted that the figures he used in calculating costs were for a different piece of property. When asked about the specific costs, the Reverend Lindsay admitted that he had left the figures at home. In fact, the Reverend Lindsay made no calculations. When asked why he chose the figure of $75.00 per week, the Reverend Lindsay admitted that he wanted to give the residents a "bargain" because it was his nature. The Reverend Lindsay testified that the customary amount was upwards of $125.00 to $150.00, nearly twice the amount he planned to charge.

RESPONSE TO REASONS FOR GRANTING WRIT

I. **THE COURT PROPERLY RULED THAT THE CITY IS EXEMPT FROM THE FAIR HOUSING ACT IN THIS CASE BECAUSE THE ZONING ORDINANCE PROVISIONS AT ISSUE ARE REASONABLE OCCUPANCY LIMITATIONS PERMITTED BY 42 U.S.C. § 3607(b)(1).**

A. The Athens Ordinance is a reasonable maximum occupancy limitation.

The issue in this case is whether the city's ordinance which limits the number of unrelated persons to four in any family dwelling constitutes a violation of the Fair Housing Act. The Petitioners wish to have a total of fourteen residents, twelve of which would be in one house. The Courts below have ruled the ordinance section at issue is a reasonable occupancy limitation, thus exempting it from further consideration under the Fair Housing Act in this particular case. 42 U.S.C. § 3607.

In pertinent part, the Fair Housing Act provides in 42 U.S.C. § 3604(f) that it shall

be unlawful to:

(1) "Discriminate in the sale or rental, or otherwise make available or deny, a dwelling to any buyer or renter because of a handicap...";

(2) "To discriminate against any person in terms of conditions or privileges of the sale or rental of a dwelling or, in the provision of services or facilities in connection with such dwelling, because of a handicap..."; and

(3) B. Refuse "to make reasonable accommodations in rules, policies, practices, or ser-vices, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling... ."

However, 42 U.S.C. § 3607 "Exemption" identifies certain groups and actions which are exempt from the requirements of the Fair Housing Act. 42 U.S.C. § 3607(b)(1) provides: "Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."

At the outset it is important to address the legislative history raised by the Petitioners in page 15 of their brief. It is their position that the intent of the exemption was that it apply only when the occupancy limitation applies to all persons without any distinction. In this case the Petitioners contend that the Athens limitation is not exempt because unrelated persons are treated differently than related persons. Such an interpretation misconstrues the intent of the exemption.

Application of the Fair Housing Act towards government is aimed at specific requirements that single out handicapped persons from those who are not handicapped. The legislative history cites an example of regulating congregate care facilities by the number of unrelated persons. The history concludes that this type of restriction has the effect of discriminating because the

requirements do not apply to other groups of unrelated persons. House Report No. 100-71, June 17, 1988, Congressional Record, Vol. 134, p. 24. In no uncertain terms the history spells out the intent which is to prohibit special regulations which are directed at the handicap use:

> The Act is intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community.

Id. (Emphasis Supplied). The Athens ordinance is not a special requirement. It is a limitation on household size that applies to everyone, whether handicapped or not.

The Petitioners insist that the ordinance must place a maximum limitation on the occupancy of both related and unrelated persons. The evidence at trial demonstrated, however, that limiting the number of related

persons was unworkable and unenforceable. Mr. Eplan testified that such a restriction would cause a family to be in violation of the law when a child was born that exceeded the limitation. He also testified that it was unworkable to provide occupancy limitations based on square footage because it would be unenforceable. More details of Mr. Eplan's testimony are provided in the Respondents' Statement of the Case.

Apart from the evidence on what is reasonable, the case law dictates that a distinction be made between related and unrelated persons, and this distinction is specifically held to be reasonable. Moore v. City of East Cleveland, 431 U.S. 494, 97 S. Ct. 1932 (1977), and its progeny, establish that limitations on the number of related persons in a dwelling is unconstitutional, and limiting occupancy by limiting unrelated persons is reasonable. In Moore, U.S. at

495-497, East Cleveland's ordinance limited the occupancy of a dwelling to members of a single-family and generally defined family to be a nuclear family. Because the Plaintiff's family fit none of the categories, she was issued a citation and then was convicted of a criminal offense. Id. Specifically, the governing authority issued a citation when Ms. Moore's grandson came to live with her after the death of the grandson's mother. Id. In holding that the ordinance was unconstitutional, the Court reaffirmed its recognition that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Id., U.S. 499 (quoting Cleveland Board of Education v. Lafleur, 414 U.S. 632, 639-40, 94 S. Ct. 791 (1974)).

The Court explained in great detail the reason for protecting family status and

clearly stated its intent to safeguard the family:

> Our decisions establish that the constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.

Id., U.S. at 503-504. See also, Id. at 504-505.

Not only have the courts struck down limits on related persons, but they have specifically held that limitations of related persons are "reasonable". Doe v. City of Butler, P.A., 892 F.2d 315 (3rd Cir. 1989). In Doe at 319 (fn. 3), 321, the Court had under its consideration an ordinance which limited the number of unrelated persons in a transitional or any other dwelling to six residents while placing no limit on the number of related persons. At issue was the city's refusal to allow a use permit for a home for

battered women which requested more than six residents. Id., at 316-317.

In rejecting the due process claim, the Court recognized density control as an appropriate goal in planning and zoning. Id., at 320. The Court then rejected the Appelant's argument that density may be controlled through other means such as occupancy limits based on lot size and lot ratio requirements. Id. The Court concluded based on Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S. Ct. 1536 (1974), that "restriction on occupancy by unrelated residents is sufficient precedent for the reasonableness of restricting density via an occupancy limit contained in a zoning regulation." Doe, at 321 (emphasis supplied).

The Appellants in Doe next argued that the limitation was not a maximum occupancy limit related to density control because there was no limit on the number of related persons

that could live together. The Court rejected that argument and in reliance on Moore, supra, held that "zoning restrictions cannot be applied to hinder those in a familial relationship from living together." Id. The Court in Doe, at 321 concluded:

> It follows that the City of Butler, no matter how valid its density concerns, could not constitutionally limit the number of related persons living together. If the absence of an occupancy limitation on the members of a family who can live together is boot-strapped into the argument that therefore there can be no occupancy limitation for unrelated persons living together, there could never be such an occupancy limitation and Belle Terre would be meaningless.

As with the ordinances in Doe and Belle Terre, supra, the ordinance in the present case limits the number of unrelated persons who may reside in a dwelling. It is well established that such a limitation is a reasonable limitation on the maximum number of persons that are permitted to reside in a dwelling. Since the limitation in Athens'

ordinance is exactly the type considered in Doe, it is a reasonable occupancy limitation and is exempt from further Fair Housing Act consideration under 42 U.S.C. §3607.

B. The ordinance is reasonable as applied.

The Petitioners next contend that the Court of Appeals erred in balancing the interest of the city against those who might occupy the halfway house to determine that the occupancy limitation is reasonable as applied in this case. It is interesting to note that the Petitioners do not challenge the conclusion that the balance falls in favor of the city.

The Court of Appeals determined that balancing interests was appropriate by comparison to the Rehabilitation Act of 1973, 87th Stat. 394, and the case law interpreting the Rehabilitation Act. Elliott v. City of Athens, 960 F.2d 975, 981 (11th Cir. 1992).

Specifically, the Court of Appeals relied on Alexander v. Choate, 469 U.S. 287, 105 S.Ct. 712 (1985), in which the Supreme Court used the balancing of interests as the appropriate method examining violations under the Rehabilitation Act. Elliott v. City of Athens, 960 F.2d 975, 981 (fn.7) (11th Cir. 1992).

Reliance on the Rehabilitation Act is grounded in the frequent comparisons to the Rehabilitation Act cited in the Fair Housing Amendments Act legislative history. See example, House Report No. 100-71, June 17, 1988, Congressional Record, Vol. 134, p.18. Moreover, even the legislative history cited by the Petitioners under the exemption contemplates the disparate impact analysis when it states that reasonable limitations will be allowed in part so long as they "did not operate to discriminate". Id. at page 31.

The basis for the argument on behalf of

the Petitioners is the dissenting opinion of Judge Kravitch. Elliott, at 985-988. The argument is advanced that a balancing test is inappropriate because a Fair Housing Act violation includes a failure to make reasonable accommodations under some circumstances. Id. at 985-986. In effect the dissent argues that the exemption does not apply when there has been a violation of the Fair Housing Act. A violation under 42 U.S.C. § 3604(f)(3)(B) includes: "a refusal to make reasonable accommodations in rules, policies, practices or services when such accommodation may be necessary to afford such person equal opportunity to use and enjoy a dwelling." Based on the language in the first part of Subsection B, the dissent concludes that discrimination is simply a refusal to make accommodations, without any balancing. Id. at 985-988. In this case the dissent and the Petitioners contend that there is a

violation because the city refused to permit the proposed use of fourteen persons on a lot in the single-family district.

While the analysis of the Petitioners and the dissent rely on the "reasonable accommodation" language of 42 U.S.C. § 3604(f)(3)(B), they ignore the language of the Subsection which requires reasonable accommodation only when an "equal opportunity" has been denied. When the entirety of Subsection (B) is considered, it is apparent that the first step in finding a violation is a finding that an equal housing opportunity has been denied and, of course, this would require the same disparate impact analysis used by the majority. Moreover, regardless of whether the issue is reasonable accommodation or a reasonable occupancy limit, the term "reasonable" itself dictates that there is a balancing of the interests.

The point which is lost by the

Petitioners, however, in using § 3604 is that this is the section which defines the unlawful conduct. It is not the section which defines the exemption. 42 U.S.C. §3607 contains the exemptions and the unlawful conduct of §3604 is not considered if the exemptions apply. As a result, consideration of reasonable accommodation under § 3604 in this discussion is inappropriate since the only issue before the Court is whether the ordinance at issue is a reasonable maximum limitation on occupancy which provides for an exemption to the conduct which may otherwise be sanctioned by the Fair Housing Act. Following this same rationale, the majority took issue with the dissenting opinion and reasoned that under the dissent's construction, the exemption would be nullified because it would only apply when there was no Fair Housing Act violation in the first place. Elliott, at n. 12, 984.

For these reasons the did Court did not

err in concluding that city's occupancy limitation was reasonable occupancy limitation thereby exempting the city from further Fair Housing Act consideration.

II. CERTIORARI IS NOT REQUIRED BECAUSE THE COURT DID NOT ERR AND A BALANCING OF INTERESTS IS THE MOST APPROPRIATE METHOD TO DETERMINE THE RIGHTS OF THE PARTIES.

Contrary to the Petitioners' complaint about preserving the rights of the handicapped, the issue for the Petitioners is whether they can sell their property to someone who wants a use that is three and one half times the permitted density in terms of occupancy. The Petitioners want to place fourteen persons on a lot that would ordinarily allow four. They contend that they should be allowed to ignore density requirements when the issue is handicap, even if it means destroying the single-family character of the zoning district. They contend that the Court should not balance the

interests of the city, but should consider only the fact that the Petitioners have been denied their precise use, even though any other group would be denied the same use when the proposed density is so high.

The fact is that the Petitioners are free to operate their use as long as limitations on occupancy are respected in the same manner that they are imposed on everyone. If the Petitioners desire a use which is more dense, then they must operate in the districts which are designed for the increased density. The Petitioners did not ever prove that they could not operate the halfway house and respect the occupancy limits.

The Petitioners simply want to avoid balancing the rights of the city because their evidence was not sufficient. On the side of the city, the Petitioners concede the interest in preserving the single-family character of neighborhoods. In the present case, they

concede the particular problems of the City of Athens in preserving neighborhoods from overcrowding by students. Respondents' Statement of the Case identifies the testimony of how city carefully chose the particular limitations on occupancy.

On the side, the Court of Appeals concluded that the Petitioners' evidence was weak. Elliott, at 982. For the reasons stated throughout, they proved only that they could not have what they wanted. Quite conspicuously, the Petitioners do not challenge the results of the majority's balancing test in favor of the Respondents.

The only way to meet the intent of the Fair Housing Act and preserve the recognized interest of government in zoning is to strike a balance between the two in precisely the manner done by the lower Court. Striking the balance will not permit government to frustrate the Fair Housing Act, but will

require a case by case evaluation of the evidence from each side and will insure that the intent is preserved.

CONCLUSION

WHEREFORE for the foregoing reasons, the Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JENKINS & EELLS

Frank E. Jenkins, III
State Bar No. 390550
Counsel of Record

Kirk R. Fjelstul
State Bar No. 260015

3005 Chamblee-Tucker Road
Suite 500, Rhodes Building
Atlanta, Georgia 30341
(404) 457-1850

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing **BRIEF FOR RESPONDENTS** upon all parties to this matter by depositing a true copy of same in the United States Mail, proper postage prepaid, addressed to counsel of record as follows:

Bradley S. Wolff, Esq.
Scott and Quarterman
Post Office Box 1232
Athens, Georgia 30603

This 24 day of September, 1992.

Kirk R. Fjelstul